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Before the
Copyright Royalty Judges
Washington, D.C.

In the Matter of	)	
	)	
Distribution of 2015	)	Docket No. 17–CRB–0011–SD
Satellite Royalty Funds	)	(2015)
	)	

MULTIGROUP CLAIMANTS'
SURREPLY ADDRESSING PROPOSED PARTIAL DISTRIBUTION OF 2015 SATELLITE FUNDS TO CERTAIN "ALLOCATION PHASE CLAIMANTS"

Multigroup Claimants, pursuant to the *Distribution of 2015 Satellite Royalty Funds, Notice Requesting Reply*, published September 29, 2017, by the Library of Congress, 92 Fed. Reg. 45624, hereby submits a surreply to comments filed by the "Devotional Claimants", "Program Suppliers" and "Allocation Phase Parties", as follows:

A. FOR THE FIRST TIME, CLAIMANTS THAT ARE PART OF THE "DEVOTIONAL CLAIMANTS" FOR PURPOSES OF 2015 SATELLITE ROYALTIES ARE IDENTIFIED.

For the first time, footnote 1 of the Devotional Claimants' reply identifies which claimants are to be considered part of the "Devotional Claimants" for purposes of 2015 satellite royalties. Still, the Devotional Claimants assert that this identification was unnecessary because Multigroup Claimants should have already been capable of determining their identity.

This argument relies entirely on submission of the list of 2015 satellite claimants prepared by the CRB (attached to the reply as Exhibit A), inexplicably suggesting that *something* within the list would immediately reveal which claimants had aligned to be part of the Devotional Claimants for 2015 satellite royalty purposes. Obviously, such is not the case. Nothing within the list of 2015 satellite royalty claimants would allow Multigroup Claimants to intuit who had aligned with the "Devotional Claimants".[1]

Of particular irony, however, is that the Devotional Claimants can't even clearly articulate which claimants are part of their group, as the entities listed at footnote 1 of the Devotional Claimants reply do not necessarily appear in either the Exhibit A list of 2015 satellite claimants, nor even the Exhibit B list of Devotional Claimants-represented claimants. See, e.g., "Liberty Broadcasting Network, Inc.", appearing at footnote 1 but not appearing in either Exhibit A or B. As Multigroup Claimants made clear in its previously filed *Objection to Partial Distribution of 2015 Satellite Funds to Certain "Allocation Phase Claimants"*, the identity of the "Devotional

[1] Devotional Claimants actually suggest that Multigroup Claimants should have contacted legal counsel for the Devotional Claimants and inquired as to their identity, as opposed to Devotional Claimants simply revealing such information as part of its motion for partial distribution.

Claimants" does not appear in the Federal Register notice, and does not appear in the *Motion of the Allocation Phase Parties for Partial Distribution of 2015 Satellite Royalty Fund*, filed February 17, 2017. Multigroup Claimants could at best presume that the "Devotional Claimants" are similar to claimants that have most recently identified themselves as the "Settling Devotional Claimants" – a presumption made only because of the commonality of legal counsel -- but had no means to independently confirm the same based on the Devotional Claimants' filings.

Further, given the *insistence* of the "Settling Devotional Claimants" ("SDC") in multiple prior proceedings that they are not a singular consortium or entity, but rather claimants that have collectively engaged the same legal counsel for particular proceedings, and the fact that the "Devotional Claimants" legal counsel never clarified on whose behalf they appear, Multigroup Claimants could not reasonably intuit who was part of the Devotional Claimants for purposes of 2015 satellite royalties.

B. BY ANY CRITERIA, THE IDENTIFIED "DEVOTIONAL CLAIMANTS" DO NOT QUALIFY AS "ESTABLISHED CLAIMANTS".

Regardless, the listing of claimants at footnote 1 of the Devotional Claimants' reply aptly makes the point of Multigroup Claimants that the Devotional Claimants wish to obscure – ***none*** of the Devotional Claimants-represented claimants have been part of a litigated satellite proceeding that has concluded with a final distribution award, because no litigated satellite proceeding has ever occurred. Even accepting the newfound position of various parties that a negotiated *settlement* of satellite royalties qualifies a party as an "established claimant" (see discussion, infra), only three of the thirty-three (33) listed entities now identified as part of the "Devotional Claimants" have ever participated in a prior settlement for the distribution of satellite royalties. The most recent of those settlements related to calendar years 1997-1998, and were settlements entered into with Worldwide Subsidy Group, LLC almost two decades ago. See Decl. of Raul Galaz.[2] The

[2] As set forth in the Declaration of Raul Galaz, Worldwide Subsidy Group, LLC dba Independent Producers Group negotiated a comprehensive settlement of 1997 and 1998 satellite royalties with only three of the claimants currently aligning themselves with the Devotional Claimants – Christian Broadcasting Corporation, In Touch Ministries, and Crystal Cathedral Ministries.

question is therefore begged: on what basis can the thirty-three "Devotional Claimants" contend that they are "established claimants"?

To this question, the thirty-three collective members of the Devotional Claimants falsely contend that they are "established claimants" because they "have received final satellite distributions for every royalty year from 1989 through 1998, have received partial distributions for every royalty year from 1999 through 2014, ***and*** have received final distribution in a contested satellite royalty proceeding for royalty year 2008." Devotional Claimants reply at p.3 (emphasis added). Phrasing the foregoing statement with "and" rather than "or" is disingenuous at best, but more appropriately characterized as a misrepresentation to the Judges.

First, the vast majority of the "Devotional Claimants" are recent participants in the royalty distribution proceedings, with only three claimants participating prior to 1999 where a "final distribution order" exists.[3] Id. To

[3] This identical criticism, i.e., the variation of represented claimants, was the basis for the Judges refusing to award IPG an amount of program suppliers royalties based on the *minimum* amount that the MPAA argued IPG was entitled, and instead awarding royalties based on the significantly smaller amount awarded in the prior litigated proceeding:

> "Indeed, IPG does not dispute the point raised by certain of the commenters that '[t]here is no assurance that a group of claimants that IPG represented in one year will be the same group in a subsequent

suggest that a majority of the thirty-three claimants have been involved as far back as 1989 is a blatant misstatement by Devotional Claimants' legal counsel, and conveniently offered without supporting evidence. Second, a "partial distribution" should have no significance when the criteria most recently set forth by the Judges clearly enunciates the need for a "final distribution allocation" (see *September 29 Order* at p.2). Further, most of the motions that preceded the partial distributions were unchallenged and, moreover, the "established claimants" criteria set forth by the Judges in September 2016 post-dates the partial distributions to any of the identified claimants. In effect, the "Devotional Claimants" position is that they should receive partial distributions simply because a smattering of the thirty-three claimants have previously received partial distributions, regardless of the fact that such claimants do not qualify under the Judges' criteria as "established claimants".

> year.' *SDC Comment* at 10; see *JSC Comment* at 3 (IPG represents 'shifting, ad hoc group of diverse claimants whose claims vary from year to year')."

Order Granting In Part And Denying In Part IPG's Motion For Partial Distribution Of Program Suppliers' Royalties at p. 10, Docket Nos. 2012-6 CRB CD 2004-2009 (Phase II) and 2012-7 CRB SD 1999-2009 (Phase II) (September 29, 2016; the "*September 29 Order*").

Third, even *if* the 2008 satellite final distribution order for the devotional programming category could qualify as a basis for allowing "established claimants",[4] it could only be for those "Devotional Claimants" that were awarded 2008 satellite royalties. An analysis of the 2008 satellite claims for the SDC reveals fifteen entities on whose behalf the SDC made 2008 satellite claims, eleven of which appear in the current list of "Devotional Claimants". See Decl. of Raul Galaz. That is, the 2008 satellite final distribution order on which thirty-three Devotional Claimants currently rely to characterize themselves as "established claimants" only includes claims, in any amount, for one-third of those claimants. Further, the significance of the 2008 final distribution order as a basis for rationalizing the amount of the partial distribution currently sought by the Devotional Claimants' is questionable absent an appropriation for 2008 satellite

[4] While technically "litigated", the 2008 satellite award to the SDC was due to the fact that the Judges dismissed all claims of Kenneth Copeland Ministries, Benny Hinn Ministries, and Creflo Dollar Ministries as a discovery sanction, i.e., not as an assessment of programming value, leaving only SDC broadcasts remaining. Prior to imposition of the discovery sanction, the SDC maintained that IPG was entitled 36.2% of the 2008 satellite royalty pool. See *SDC Amended Direct Statement*, Testimony of John Sanders at p. 11 (July 8, 2014), 2012-7 CRB SD 1999-2009 (Phase II). As a result of the discovery sanction, IPG did not challenge that it had no remaining compensable claims for 2008 satellite royalties, a situation unlike any other calendar year and unlike the situation for 2015 satellite royalties.

royalties between claimants which do/do not currently appear as part of the 2015 "Devotional Claimants". No such appropriation has been presented, and so it is unclear to what degree claimants appearing as Devotional Claimants for both 2008 satellite and 2015 satellite were responsible for the 2008 satellite royalties.

In sum, the current "Devotional Claimants" attempt to ride the coattails of a single award for 2008 satellite that was made to an entirely different group of claimants, under circumstances in which all adverse claims were dismissed despite an acknowledged value (i.e., product of a discovery sanction), and without any presentation as to the significance of the award to those claimants appearing in both groups.

C. THE MPAA-REPRESENTED PROGRAM SUPPLIERS FAIL TO IDENTIFY WHICH CLAIMANTS THEY REPRESENT IN ORDER TO ASSESS WHETHER THEY ARE "ESTABLISHED CLAIMANTS". ABSENT IDENTIFICATION, THE JUDGES CANNOT ASSESS WHICH CLAIMANTS ARE LIABLE FOR REPAYMENT OF THE ADVANCE DISTRIBUTIONS.

Similar to the Devotional Claimants' reply, the MPAA argues that Multigroup Claimants "feigns confusion over the identity of the Program

Suppliers". However, contrary to the Devotional Claimants' reply, the MPAA fails to identify *any* of the claimants it purports to represent. Rather, the MPAA asserts that it has been and remains "the *de facto* representative of all Program Suppliers claimants." MPAA reply at fn.1. For this reason, the MPAA asserts that it has no need to identify which claimants have engaged the MPAA (if any such claimants actually exist).[5]

[5] Multigroup Claimants does not make such statement lightly. In IPG's first appearance in these proceedings, the 1997 cable proceedings, MPAA refused to produce copies of the agreements between itself and represented claimants, until ordered to do so. See *Order of June 28, 2000* at p.6, Docket no. 2000-2 CARP CD 93-97 (June 28, 2000). The MPAA refusal was, in fact, a dilatory tactic. It was subsequently revealed that the MPAA had received approximately $65 Million in advance distributions on behalf of Program Supplier claimants, despite not having a single agreement with a claimant in place for representation in the 1997 cable proceedings. Despite the MPAA filing of a petition to participate in such proceeding, and the receipt of an extraordinary advance distribution, and the submission of declarations under penalty of perjury that the MPAA had been engaged by claimants with Program Supplier claims prior to the distribution of advance distributions, *such representations were false and fraudulent*. IPG reported such facts to the standing CARP, who nonetheless allowed the MPAA to continue participating because they were able to secure claimant authorizations post-facto, during such time as the CARP was considering IPG's motion to compel production of the in-the-process-of-creation documents. According to the stringent criteria repeatedly employed by the standing CRB in the claims challenge process, the MPAA and its represented claimants would have been dismissed altogether from the 1997 cable proceedings.

The gist of the MPAA assertion is that it represents all Program Supplier claimants, whoever they might ultimately be, so claimant identification is not necessary.[6] Such position might be sufficient to allow the MPAA to **represent** the Program Suppliers category in these proceedings, but not sufficient for the purpose of the MPAA **securing an advance distribution** of royalties.

As noted in Multigroup Claimants' previously filed *Objection to Partial Distribution of 2015 Satellite Funds to Certain "Allocation Phase Claimants"*, precedent in prior distribution proceedings required a Phase I representative (i.e., an "Allocation" representative) to act on behalf of all claimants within such Phase I category.[7] Nevertheless, entities previously identifying themselves as representing the "Program Suppliers" and the "Devotional Claimants" categories have historically received and utilized millions of dollars of advanced royalties to fund their own Phase II

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[6] It should be noted that the list of MPAA-represented claimants has varied widely over the years of distribution proceedings, dramatically more than SDC or IPG represented claimants. As noted above, such fact was the very basis on which the Judges significantly reduced the partial distribution sought by IPG to an amount far less than the minimum amount that the MPAA contended IPG was entitled. See supra.

[7] *See* Docket no. 2000-2 CARP CD 93-97, Order of August 31, 2000, at pp. 4-6.

expenditures (currently known as "distribution phase"), yet refused to distribute advanced royalties to any other Phase II claimants, thereby violating the edict of the Judges' predecessors. Consequently, absent the MPAA's representation that it will remit advance distribution royalties to all Program Supplier claimants (e.g., Multigroup Claimants-represented claimants) no differently than it remits advance distribution royalties to MPAA-represented Program Suppliers, it is a misstatement for the MPAA to assert that its motion for partial distribution is made on behalf of *all* Program Supplier claimants. What remains, therefore, is the MPAA's hollow representation that it is securing a partial distribution on behalf of *all* Program Supplier claimants, and its failure to identify *any* MPAA-represented Program Supplier claimant.

Also similar to the Devotional Claimants' reply, the MPAA asserts that there is some significance to the issuance of prior partial distributions. Again, a "partial distribution" should have no significance when the criteria most recently set forth by the Judges clearly enunciates the need for a "final distribution allocation" (see *September 29 Order* at p.2), most of the partial distribution motions were not challenged and, moreover, the "established

claimants" criteria set forth by the Judges in September 2016 post-dates the partial distributions to any of the identified claimants. No different than the "Devotional Claimants", the MPAA's position is that they should receive partial distributions simply because they have previously received partial distributions, regardless of the fact that its represented claimants do not qualify under the Judges' criteria as "established claimants".

Under the Judges' most recently announced criteria requiring a final distribution order following a *litigated* satellite proceeding (see infra), no Program Supplier claimant is entitled advance distribution of *satellite* royalties, under any circumstances. Nonetheless, the MPAA misrepresents that such a litigated proceeding occurred and resulted in a final distribution allocation order. MPAA reply at fn.2, citing Exhibit B. Specifically, the MPAA cites to an order from 1996-1998 satellite proceedings, however review of that document reflects a final distribution order following a *settlement* between the MPAA and another party relating to 2008 satellite royalties. In fact, the cited document reflects that the settlement occurred during the "good faith negotiation period", i.e., prior to any submission of pleadings that could be construed as the commencement of genuine "litigation". By no stretch of the imagination can such order be

characterized as a *litigated* satellite proceeding resulting in a distribution allocation order.

Consequently, and no different than the Devotional Claimants, the MPAA is left with its contention that a negotiated *settlement* of satellite claims is the only means by which its represented claimants can qualify as "established claimants", in direct contradiction of the MPAA's prior position on such matter.

D. THE CRITERIA PREVIOUSLY ESTABLISHED BY THE JUDGES REQUIRES A FINAL DISTRIBUTION ORDER BASED ON A *LITIGATED* PROCEEDING.

The remarkable flip-flop that appears in the reply papers is the newfound assertion that a party can achieve "established claimant" status via a non-litigated proceeding, *or even a confidential settlement*. Such position stands in stark contrast to the positions of the MPAA and the SDC when they opposed any advance distribution to Independent Producers Group, whom as a matter of public record had reached settlements with both the SDC and the MPAA for satellite royalties (and cable royalties) in prior years.[8] Taking the staunch position that qualification as an "established

[8] As noted, Worldwide Subsidy Group, LLC entered into a comprehensive settlement agreement of 1997-1998 satellite royalties attributable the

claimant" in the satellite royalty proceedings requires a final distribution order following a *litigated* satellite proceeding, both the SDC and MPAA maintained that IPG was not an "established claimant". Such position would have been an obvious misstatement, if not outright lie, if either had intended to maintain that a confidential settlement of satellite claims qualifies a party as an "established claimant", as both entities were aptly aware of their prior settlements with IPG. In fact, it is even a matter of public record that IPG reached comprehensive settlement agreements with the SDC and MPAA for satellite royalties during specific years, yet neither the SDC or MPAA maintained that such settlement of satellite royalties elevated IPG's status to that of "established claimants".

Notably, in opposition to IPG's motion for partial distribution of 2000-2009 satellite royalties in the Program Suppliers category, the MPAA had the following to say:

> As the Copyright Royalty Tribunal ("CRT") held repeatedly, initial partial distributions are made only to established claimants based on final ***litigated*** awards . . . ."

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devotional programming category. WSG also entered into a comprehensive settlement agreement with the MPAA-represented Program Suppliers for 1997-1999 satellite royalties attributable to the Program Suppliers category. All such agreements were subject to a confidentiality provision. See Decl. of Raul Galaz, para. 5.

* * *

> Moreover, CRT precedent expressly rejects any reliance on the claims advanced by parties in an ongoing proceeding as a legitimate basis for awarding a partial distribution of royalties, and instead based partial distribution awards on final ***litigated*** awards established in prior distribution proceedings. See 51 Fed. Reg. 44331 (December 9, 1986); 48 Fed. Reg. 54679 (December 6, 1983).
>
> * * *
>
> The CRT and the Copyright Office typically limited initial partial distribution awards of royalties to a reasonable percentage (typically 50%) of an established claimant's prior ***litigated*** award. See April 10, 2002 Order at 2; 47 Fed. Reg. at 21475. More recently, the Judges have limited initial partial distributions of royalties subject to controversy under Section 801(b)(3)(C) to 60% of an established claimant's prior ***litigated*** award. [Citing *Order Granting Motion Of Phase I Claimants For Partial Distribution*, Docket No. 14-CRB-0010 CD (2013) at 1-2 and Attachment A (May 28, 2015); *Order Granting Motion Of Phase I Claimants For Partial Distribution*, Docket No. 14-CRB-0011 SD (2013) at 1-2 (May 28, 2015).]

MPAA Comments on IPG Motion for Partial Distribution at pp. 4, 11-12, Docket Nos. 2012-6 CRB CD 2004-2009 (Phase II) and 2012-7 CRB SD 1999-2009 (Phase II) (Jan. 15, 2016) (emphasis added). See also, *Settling Devotional Claimants Comments on IPG Motion for Partial Distribution* at pp. 6 et seq., Docket Nos. 2012-6 CRB CD 2004-2009 (Phase II) and 2012-7 CRB SD 1999-2009 (Phase II) (Jan. 15, 2016) (challenging that IPG is not

an "established claimant").[9]

The SDC and the MPAA most recently challenged the advance distribution to IPG of satellite royalties, even though IPG sought partial distribution of the *minimum* amounts that the SDC and MPAA argued that IPG was entitled in such satellite proceedings. Nonetheless, while denying an advance distribution of satellite royalties, the Judges authorized an advance distribution of 2004-2009 cable royalties in the Program Suppliers category. The *only* distinction between IPG's motion for advance distribution of cable versus satellite royalties was that IPG had concluded a litigated *cable* proceeding in the Program Suppliers category, but had not concluded a litigated *satellite* proceeding. This singular fact demonstrates that the Judges required a prior final distribution allocation to be the product of a *litigated* order. Moreover, if there were no significance to whether a

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[9] The "Allocation Phase Parties" were apparently unaware of the foregoing arguments and authority when they incorrectly argued:

> "[T]he Judges have *never* suggested that a litigated allocation is necessary for a party to be an established claimant, only that the allocation be final – by compromise or otherwise. . . . Nor would such a litigation prerequisite for partial distributions make sense."

Allocation Phase Parties' reply at p.3 (emphasis added).

final distribution allocation was based on a *litigated* proceeding, as the Devotional Claimants and MPAA contend, no basis would have existed for the Judges to have affirmatively reduced IPG's proposed partial distribution from what IPG sought (a partial distribution based on the already *minimum* amounts that the SDC and MPAA argued that IPG was entitled) to only those amounts received by IPG pursuant to a *litigated* proceeding. Such was the express basis by which the Judges reduced IPG's partial distribution. Clearly, the Judges' ruling makes no sense in the absence of deeming a litigated proceeding a prerequisite to qualifying as an "established claimant".

Quite simply, the Devotional Claimants and the MPAA cannot have it both ways.[10] As acknowledged, no final satellite distribution order has *ever* been based on a litigated proceeding making an allocation between parties.[11]

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[10] Anticipating this very scenario, i.e., the existence of future motions for partial distribution of satellite royalties brought by the SDC and the MPAA (or derivations of either), IPG previously noted to the Judges the rather obvious fact that the SDC and MPAA argument that partial distribution is contingent on a prior distribution order arising from a litigated proceeding necessarily foreclosed the SDC and MPAA from receiving future partial distributions of satellite royalties, until a litigated proceeding concluded with a final allocation of satellite royalties. See *September 29 Order* at pp. 7-8.

[11] The only arguable exception relates to 2008 satellite royalties for the devotional programming category, which while technically "litigated", was not litigated as to an appropriation amongst parties, due to imposition of a discovery sanction. See supra.

If status as an "established claimant" requires a prior *litigated* award, as has been the position of both the SDC and MPAA when they successfully blocked any advance distribution of satellite funds to IPG, then neither the Devotional Claimants or the MPAA may now assert that they represent "established claimants". If such parties now take the contrary position, and argue that a mere confidential *settlement* of satellite claims achieves "established claimant" status, then their prior briefing must be construed to have contained blatant misrepresentations by their legal counsel. No middle ground exists.[12]

CONCLUSION

Applying the Judges' holdings to the current motion for partial distribution, none of the (possibly) multiple claimants that comprise the "Program Suppliers" or the "Devotional Claimants" have received "a final allocation of satellite royalties", and *even if the Judges concluded that a partial distribution were warranted*, and *even if adverse allocation phase*

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[12] If the Judges were to adopt the newfound position that a confidential settlement agreement qualifies a party to be an "established claimant", IPG would be entitled to and would seek an immediate order issuing advance distribution of royalties for all active proceedings, in *both* the devotional and Program Suppliers categories, for *both* cable and satellite proceedings.

parties concluded that a partial distribution were warranted, the Judges have no basis for allocating an appropriate partial distribution. Such is the straightforward ruling of the Judges.

The Judges' previous ruling makes clear that neither the "Program Suppliers" or "Devotional Claimants" are or represent "established claimants" in satellite proceedings, and the Judges are therefore *precluded* from awarding them a partial distribution of satellite royalties. Although the MPAA and Devotional Claimants have previously been granted unrestricted partial distributions of satellite royalties, such partial distributions to the MPAA and the Devotional Claimants cannot be reconciled with the standards most recently established by the Judges. Consequently, such prior partial distributions cannot be deemed precedent for any entitlement to partial distribution of satellite royalties to the "Program Suppliers" or "Devotional Claimants", the identity of whom remain unclear.

The Judges should grant the Allocation Phase Parties' motion only subject to the caveat that any partial distribution not be paid over to the yet-to-be-identified "Program Suppliers" and "Devotional Claimants". Moreover, the partial distribution should be reduced to a figure that equals no more than 36% of the aggregate pool for reasons set forth in Multigroup

Claimants' previously filed *Objection to Partial Distribution of 2015 Satellite Funds to Certain "Allocation Phase Claimants"*.

Respectfully submitted,

Dated: November 9, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of November 2017, a copy of the foregoing was sent by electronic mail to the parties listed on the attached Service List.

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